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In The

Supreme Court of The United States

October Term, 1955

No.....

CAMMIE B. HOLMAN,

Appellant,

vs.

GUERDON M. MATTHEWS, Commissioner of Banks,

Appellee.

APPELLANT'S JURISDICTIONAL STATEMENT

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Appellant appeals from the judgment of the Supreme Court of the State of Wisconsin, entered June 28, 1955, reversing the judgment of the Circuit Court for Dane County and directing that the appellant's complaint be dismissed.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented as to the constitutionality of the Wisconsin Collection Agency Law, Sec. 218.04 Wis. Stats.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported in Vol. 270 Wisconsin Reports, p. 453, and in Vol. 71 Northwestern Reporter, 2d, p. 368, and it is set forth in Appendix C hereto, pp. 50-67.

Copies of the opinion and judgment of the Circuit Court are attached hereto as Appendix A, pp. 41-48, and Appendix B hereto, pp. 49-50, respectively.

As appears from the opinions, the instant case is one of three similar cases. By stipulation of the parties, the other two cases will abide the decision of this Court on the merits of the present case.

The three cases are sequels to the case of *Metropolitan Finance Corporation v. Matthews*, 265 Wis. 275, 61 N. W. 2d 502, decided December 1, 1953, in which the Wisconsin Supreme Court held that sec. 218.04 Wis. Stats., the collection agency law, could not constitutionally apply to the Metropolitan Finance Corporation, a collection agency having its place of business at Kansas City, Missouri; but withheld any ruling as to the applicability of the statute to Metropolitan's solicitors, of which appellant here is one, for the reason that no solicitor was a party to that action. The opinion of the Circuit Court of Dane County, Wisconsin, in that case is printed as Appendix G hereto, pp. 83-94, and that of the Supreme Court of the State, as Appendix H hereto, pp. 94-99.

The history of the litigation is set forth at p. 9 hereof.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The suit was brought under the Wisconsin Declaratory Judgment Act, sec. 269.56 Wis. Stats., and the injunction statute, sec. 268.01 Wis. Stats., for a declaratory judgment that sec. 218.04 Wis. Stats. cannot lawfully prohibit plaintiff (appellant here) from carrying on in Wisconsin his business of soliciting offers to assign accounts to Metropolitan Finance Corporation for collection in the manner set forth in the complaint, without compliance with said sec. 218.04, for the reason that if sec. 218.04 be construed as requiring such compliance on the part of plaintiff (appellant here), it violates Article I, section 8 of the Constitution of the United States because (1) imposing undue burdens on interstate commerce and (2) attempting to regulate interstate commerce in a field which has been preempted by Congressional legislation. It was further prayed that the defendant (appellee here) be enjoined from enforcing sec. 218.04 against plaintiff (appellant here).

2. The judgment of the Supreme Court of Wisconsin was dated and entered June 28, 1955. (See Appendix C hereto, p. 67) It upheld the validity of sec. 218.04 Wis. Stats. as applied to plaintiff (appellant here). Notice of appeal was filed in that court on September 13, 1955.

3. The jurisdiction of the Supreme Court of the United States to review the decision and judgment of the Supreme Court of Wisconsin by appeal is conferred by Title 28, United States Code, sec. 1257 (2), since the validity of a state statute on grounds of repugnancy to the Constitution and laws of the United States is drawn in question, and the decision of the state court is in favor of its validity.

4. The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal:

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 159.

Railway Express Agency v. Virginia, 347 U. S. 359.

Dean Milk Co. v. Madison, 340 U. S. 349.

Connecticut Mutual Life Ins. Co. v. Moore, 333 U. S. 541.

STATUTES INVOLVED

The validity of sec. 218.04 of the Wisconsin Statutes is involved. The section is found in Volume 1 Wisconsin Statutes 1953, pp. 2776-2780, inclusive. The pertinent parts of the statute are set forth in Appendix D hereto, pp. 68-74.

Appendix E hereto, pp. 75-78, contains the material portions of an administrative order issued under that statute by the Commissioner of Banks, on August 12, 1949, and of the Outline of Policy also issued by him.

These cases also involve the effect of the Federal Trade Commission Act, 15 U. S. Code, sec. 45, and the Postal Fraud Laws, 18 U. S. Code, sec. 1341 and 39 U. S. Code, sec. 259, as pre-empting the field sought to be occupied by sec. 218.04 Wis. Stats. The pertinent parts of those federal statutes are set forth in Appendix F hereto, pp. 79-83.

QUESTIONS PRESENTED

1. Whether sec. 218.04 Wis. Stats. imposes an unconstitutional burden on interstate commerce in violation of Article I, Section 8, of the Constitution of the United States.

The statute, as interpreted and applied by the Wisconsin Supreme Court, prohibits appellant, a resident of Alabama, from soliciting in Wisconsin offers to assign accounts to Metropolitan Finance Corporation, a collection agency at Kansas City, Missouri, for collection (such offers being sent by mail by appellant to Metropolitan for acceptance or rejection by it at Kansas City, and on acceptance, Metropolitan's efforts in attempting collection being solely by interstate mail), without (a) his obtaining a license, and without (b) Metropolitan also obtaining a license; both appellant and Metropolitan being required by the statute, as a condition of obtaining such license, to pay fees, maintain an office in Wisconsin, give bond, use approved forms, keep prescribed records, file statements and reports and assume other burdens.

2. Whether sec. 218.04 Wis. Stats., in imposing such requirements on appellant and Metropolitan, unconstitutionally invades a field which the Congress of the United States has pre-empted by the Federal Trade Commission Act (15 U. S. C., sec. 45), and by the Postal Fraud Laws (18 U. S. C., sec. 1341 and 39 U. S. C., sec. 259).

STATEMENT OF THE CASE

Material Facts

Appellant is engaged in several states as an itinerant solicitor of business for Metropolitan Finance Corporation, a collection agency located at Kansas City, Missouri, and wishes to carry on such solicitation in Wisconsin, but has been deterred from so doing by the insistence of the appellee, as the state official charged with the administration of sec. 218.04 Wis. Stats., that he must first obtain a license under that statute and comply with its other burdensome requirements. This action was brought to obtain an adjudication that the statute does not and cannot constitutionally apply to appellant.

Metropolitan Finance Corporation is a Missouri corporation located at Kansas City in that state. It has no office in Wisconsin. It conducts its collection service exclusively by mail. Everything that is done by or on behalf of Metropolitan in Wisconsin is done by mail from outside the state, excepting only the solicitation of accounts for collection.

In order to get business Metropolitan contracts with solicitors, including appellant, to secure offers from creditors to assign unpaid accounts and notes to Metropolitan for collection.

Appellant and other solicitors personally solicit offers from merchants, hospitals, doctors, and other creditors, to assign lists of unpaid accounts to Metropolitan for collection. They solicit mainly in smaller towns and cities, and move frequently from place to place. (Record, pp. 20, 46-47, 49, 50, 51)

The offers so obtained are forwarded by mail to Metropolitan at Kansas City for acceptance or rejection there.

When the offers sent in by a solicitor are accepted, the solicitor is immediately paid by Metropolitan in accordance with an agreed schedule of fees, and without regard to Metropolitan's success in making collections. The solicitor has no further connection with the creditors or the accounts, and at no time has any connection with any debtor. He has no right, but is expressly forbidden by his contract, to collect or attempt to collect any of the accounts or to contact the debtors in any way. Appellant is exclusively a solicitor. He is not a collector, and in no circumstances does he handle any money of either debtor or creditor. (Record, pp. 12, 20-22, 24-25)

The offers to assign accounts are made directly to Metropolitan. The solicitor never has any right, title or interest in any debt, note or account, or in any offer to assign the same. (Record, pp. 21, 25)

When an offer to assign accounts, sent in by the solicitor, is accepted, Metropolitan proceeds with its efforts to collect the accounts, exclusively by mail from Kansas City. If these efforts fail in any case, Metropolitan returns the account to the assignor creditor. It never sues on an assigned account or makes any collection effort except demands by mail for payment. (Solicitor's Manual, pp. 6-7, Record, p. 62). It employs no collectors to call upon debtors and has no personal contact of any kind with them. Likewise, all its dealings with the assignor-creditors after the solicitation and assignment and during the collection procedure are conducted by interstate mail. The solicitors have nothing to do with the collection procedure.

Requirements Imposed On Solicitors

Sec. 218.04, if applied to appellant, would require him to

(1) Obtain a license, making written application therefor under oath on a prescribed form, and pay an annual fee of $2.00 (subsecs. (2), (3) (a) and (3) (c); Appendix D, pp. 69, 70).

(2) File a bond in the form and amount prescribed by and acceptable to the appellee; (subsec. (3) (d); Appendix D, p. 70).

(3) Maintain a place of business in Wisconsin at "the location specified in the license," where service of notices may be made upon him; (subsecs. (4) (a), (5) (b); Appendix D, pp. 70-71).

(4) Keep books and records in a Wisconsin office, open to inspection by the appellee for six years; (subsecs. (7) (b), (10) (b); Appendix D, pp. 72, 73-74).

(5) Submit to investigations as to his character and financial responsibility and to examinations under oath, and pay the cost of the first investigation or examination in any license year, including a pro-rata share of the salaries and expenses of appellee's staff (subsecs. (4) (a) and (7) (b); Appendix D, pp. 70, 72).

(6) File annual reports; (subsec. (10) (a), Appendix D, p. 73).

(7) Use only such forms as are approved by the appellee. (Order of August 12, 1949, Appendix E hereto, p. 75).

History of the Litigation

In 1953 Metropolitan Finance Corporation commenced an action in the Circuit Court for Dane County, Wisconsin, against the present appellee, as Commissioner of Banks, challenging his authority to require Metropolitan or its solicitors to comply with the requirements of sec. 218.04 as a condition of soliciting business in Wisconsin and collecting accounts of Wisconsin creditors.

The Circuit Court held that the statute did not apply to Metropolitan, because if it did apply it would violate the commerce clause; and enjoined the Commissioner from enforcing the statute against Metropolitan or its solicitors. See Appendix G hereto, pp. 83-94.

On appeal, the Supreme Court of Wisconsin modified the judgment by eliminating its application to solicitors because no solicitor was a party to the action, and as so modified, affirmed it. See Appendix H hereto, pp. 94-99.

Metropolitan Finance Corporation v. Matthews, 265 Wis. 275, 279-280, 61 N. W. 2d, 502, 504

The Supreme Court's decision was limited to the facts as shown by the complaint, which was before the court on demurrer. The court said:

> "So long as the solicitors are independent contractors, and not subject to the direction of the plaintiff, its proposed activities within Wisconsin would be so minor that they would not be subject to regulation by the state. That may not be true so far as the solicitors are concerned. Presumably they will be Wisconsin people dealing with Wisconsin people." (265 Wis. at 279, 61 N. W. 2d, at 504)

See Appendix H hereto, p. 98.

Copy of the opinion of the Wisconsin Supreme Court in the *Metropolitan* case is attached hereto as Appendix H, pp. 94-99.

Three Metropolitan solicitors thereupon instituted actions, of which the instant case is one. The complaints allege substantially the same facts as in the *Metropolitan* case, with additional facts showing that each plaintiff solicitor is an independent contractor rather than an employee of Metropolitan (Record, pp. 3-5, 21, 22, 24-25), the Supreme Court's decision in the *Metropolitan* case having appeared to attach significance to the question whether the solicitors were independent contractors. Defendant answered and took discovery depositions of the plaintiff Holman, and of Meyers, the plaintiff in a companion case. Plaintiffs moved for summary judgment.

Judgments in the three solicitors' cases were entered in the Circuit Court for Dane County, Wisconsin, on February 7, 1955, granting plaintiffs' motion for summary judgment, and adjudging that each plaintiff is engaged in interstate commerce in soliciting offers to assign accounts to Metropolitan Finance Corporation and that therefore sec. 218.04 Wis. Stats. does not apply to such solicitors, and enjoining defendant (appellee here) from enforcing the section against such plaintiffs, whether they be agents or independent contractors. (See Appendix B hereto, pp. 49-50)

On appeal these judgments of the Circuit Court were reversed by the Supreme Court of Wisconsin on June 28, 1955 (270 Wis. 453, 371 N. W. 2d 368), and the cases remanded with instructions to vacate the judgments and dismiss the complaints. (See Appendix C hereto, pp. 50-67)

Metropolitan Finance Corporation was not a party to these solicitor actions, and the application of sec. 218.04 to it was not in issue nor litigated. However, the Supreme Court of Wisconsin took occasion to state in its opinion that the statute is applicable to Metropolitan, saying:

> "Under all the evidence, Metropolitan itself is reaching, through its agents, into Wisconsin and dealing with the people of Wisconsin. The respondents' right to engage in the activities of solicitors and to create the incidences connected with doing a collection agency business stems from the primary licensing of the collection agency.
>
> "Under the facts, Metropolitan and its solicitors would be subject to the provisions of sec. 218.04 Stats. and the statute is not under any condemnation arising from restrictions burdening interstate commerce." (Appendix C hereto, p. 66)

The Requirements Imposed On Metropolitan

Thus the Wisconsin Supreme Court held that in order that appellant may solicit business for Metropolitan in Wisconsin, Metropolitan itself must also obtain a license in Wisconsin. Therefore Metropolitan, and the interstate commerce conducted by Metropolitan with Wisconsin people, will be subjected to the following burdens:

(1) Metropolitan must obtain a license and pay an initial fee of $100 or more (subsec. (3) (b); Appendix D, p. 69).

(2) It must pay an annual fee of $50 (subsec. (3) (b); Appendix D, p. 69).

(3) It must give a bond of $5,000 or more (subsec. (3) (d); Appendix D, p. 70, and pursuant to appellee's practice of fixing bond at that amount).

(4) It must maintain an active office in Wisconsin where service of notices may be made upon it (subsecs. (4) (a), (5) (b); Appendix D, pp. 70, 71).

(5) It must keep books and records in a Wisconsin office open to inspection by the appellee for six years (subsecs. (4) (a), (7) (b), (10) (b); Appendix D, pp. 70, 72, 73-74).

(6) It must submit to investigations and examinations and pay the cost of the first investigation or examination in any license year, including a pro-rata share of the salaries and expenses of appellee's staff (subsecs. (4) (a), (7) (b); Appendix D, pp. 70, 72).

(7) It must file annual reports (subsec. (10) (a); Appendix D, p. 73).

(8) It must use only such forms as are approved by the appellee (Order of August 12, 1949, Appendix E hereto, p. 75).

(9) It must make remittance of amounts collected by it to the creditor within 30 days of the end of the month of collection (subsec. (9m) (a); Appendix D, p. 73, and Order of August 12, 1949, Appendix E hereto, p. 76).

The burdens imposed on Metropolitan are very material to the appellant solicitor, for if in practical effect they operate to exclude Metropolitan from making collections by mail

from Wisconsin debtors, then as the Supreme Court of Wisconsin has ruled, appellant cannot solicit for Metropolitan in the state, and hence is himself excluded.

How the Federal Questions Were Raised and Passed Upon

The federal questions sought to be reviewed were raised in the Circuit Court for Dane County, Wisconsin, by appropriate allegations in the complaint alleging the unconstitutionality of sec. 218.04 Wis. Stats. if construed to apply to plaintiff, because in conflict with the commerce clause and invading a field pre-empted by federal legislation; and praying declaratory and injunctive relief against enforcement of the statute. (Record, pp. 7-9)

The federal questions were argued in briefs and orally to the Circuit Court on plaintiff's motion for summary judgment, and in the Wisconsin Supreme Court on appeal from such judgment.

The question of conflict with the commerce clause was passed upon by the Circuit Court in an opinion rendered January 25, 1955, by Hon. Alvin C. Reis, Circuit Judge, holding that the solicitors are engaged in interstate commerce, and that sec. 218.04 Wis. Stats., if applied to them would violate the commerce clause of the federal Constitution (Appendix A hereto, pp. 41-48). The Circuit Court's judgment adjudged that:

> "Plaintiff, whether as agent or independent contractor, is engaged in interstate commerce in soliciting offers to assign accounts to Metropolitan Finance Corporation, and that therefore sec. 218.04 Wis. Stats. does

not apply to plaintiff under these circumstances." (Appendix B hereto, p. 49).

The commerce clause question was passed upon by the Supreme Court of Wisconsin in its opinion rendered June 28, 1955, holding that sec. 218.04 Wis. Stats. "is not under any condemnation arising from restrictions burdening interstate commerce," and reversing the judgment of the Circuit Court with instructions to dismiss the complaint. (Appendix C hereto, pp. 66-67)

The question whether Congress has pre-empted the field to the exclusion of the Wisconsin statute was not reached by the Circuit Court. It was passed upon by the Supreme Court of Wisconsin in the opinion of June 28, 1955, which held that

> "The field of regulation of collection agencies and solicitors for the purpose of protecting the interests of the public has not been pre-empted by Congress. In the absence of the barriers of discrimination and undue burden, a state may pass regulatory laws to protect its residents from fraud and unconscionable conduct by out-of-state collection agencies who maintain representatives within the borders of the state." (Appendix C hereto, p. 58).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. The Question of Unlawful Burden On Interstate Commerce.

The practical effect of the decision appealed from is to exclude appellant and other Metropolitan solicitors from soliciting business for Metropolitan in Wisconsin, and also

to exclude Metropolitan itself from extending its interstate mail collection service to that state.

The burdens imposed by the Wisconsin statute as interpreted and applied by the state court are prohibitive, and are discriminatory in effect and hence are destructive of interstate commerce.

If Wisconsin can exclude Metropolitan and its solicitors from the state except upon compliance with the prohibitive burdens imposed by sec. 218.04 Wis. Stats., so can every other state, thus creating a situation of the very sort which the commerce clause was designed to prevent.

In practical effect, the statute is "fence-me-in" legislation, protecting the local collection industry from out-of-state competition, and of course depriving the people of Wisconsin of the opportunity to employ Metropolitan's services.

Appellant's solicitation is an integral, essential and inseparable part of the stream of interstate commerce, and cannot be subjected to undue burdens by the states.

The collection business of Metropolitan as conducted in Wisconsin, and in every other state except its home state of Missouri, is clearly and exclusively interstate commerce. Everything is done by interstate mail, save only the personal solicitation of accounts for collection by Metropolitan's solicitors, such as appellant.

The subject matter of that interstate commerce—services and papers—is subject to the protection of the commerce clause the same as goods and commodities.

Freeman v. Hewitt, 329 U. S. 249, 258-259.

International Textbook Co. v. Pigg, 217 U. S. 91.

Associated Press v. National Labor Relations Board, 301 U. S. 103, 128.

The solicitation by appellant of accounts for collection is an integral, essential and inseparable part of the flow of interstate commerce. Without accounts to collect, there could be no collection service in interstate commerce.

There are no separable local activities. Appellant solicitor does nothing in Wisconsin but solicit offers to assign accounts, which are mailed to Metropolitan at Kansas City for acceptance or rejection there.

Hence no burdens may be placed by Wisconsin on the solicitation, that cannot be imposed on the interstate collection service itself.

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid, if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."
>
> *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 166.

Appellants are itinerant "drummers" and the present case falls squarely within the well-established rule of the "drummer" cases, that the states cannot burden by license

or tax the solicitation of orders for interstate shipments or services.

See

Memphis Steam Laundry Cleaner v. Stone, 342 U. S. 389, 392-393.

Nippert v. Richmond, 327 U. S. 416.

Real Silk Hosiery Mills v. Portland, 268 U. S. 325.

Solicitation alone is not sufficient to constitute doing business in a state, even for the purpose of service of process.

Green v. Chicago, etc., R. Co., 205 U. S. 530, 533-534.

Roberts v. Evans Case Co., 218 F. 2d 893, 894-895 (C. A. 7th, 1955).

Riverbank Laboratories v. Hardwood Products Corporation, 220 F. 2d 465, 466-467 (C. A. 7th, 1955).

The Wisconsin legislature has recognized that mere solicitation of interstate business does not bring a foreign corporation within the state's regulatory jurisdiction.

Thus sec. 180.801 (3) (d) Wis. Stats., enacted in 1951, provides:

"* * * a foreign corporation may, without procuring a certificate of authority, carry on in this state any one or more of the following activities:

* * *

"(d) Soliciting or procuring orders, whether by mail or through employes or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts."

The State's police power does not warrant the interference with interstate commerce.

The burdens imposed upon interstate commerce cannot be justified by the argument that the statute is a regulatory measure enacted in the exercise of the state's police power.

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 336.

Schafer v. Farmer's Grain Co., 268 U. S. 189, 198-199.

Public Utilities Comm. v. Attleboro Steam Co., 273 U. S. 83, 89.

Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 604.

"Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce."

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 336.

"The legislation is not saved by calling it an exercise of the police power * * *."

Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 604.

Appellant's right to solicit business for Metropolitan in Wisconsin is not a privilege derived from state law, but a federal right which the state cannot deny or fetter with burdensome conditions.

"The right to buy it (wheat) for shipment, and to ship it, in interstate commerce, is not a privilege de-

rived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution."

Schafer v. Farmer's Grain Co., 268 U. S. 189, 198-199.

In that case the court said further:

"The defendants make the contention that we should assume the existence of evils justifying the people of the state in adopting the act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the states that are affected." (268 U. S. at 202; 69 L. ed. at 916).

The invalidity of the state statute does not leave the people of Wisconsin unprotected from deceptive or sharp practices, if any, on the part of out-of-state collection agencies. Congress has equipped the Federal Trade Commission and the postal authorities with ample authority to suppress unfair or fraudulent methods if used by interstate collection agencies and their solicitors, (see statutes set forth in Appendix F hereto, pp. 79-82), and those Federal bodies have been active in that field.

Thus the Federal Trade Commission is empowered to prevent unfair or deceptive acts or practices in commerce by the issuance of cease and desist orders, and has frequently exercised that authority to stop undesirable practices of collection agencies. (See pp. 33-34 below.)

The burdens imposed by the statute are prohibitive.

The burdens imposed directly upon appellant and other Metropolitan solicitors are summarized at page 8 above. Among them is the requirement that appellant must maintain a "place of business" in Wisconsin at "the location specified in the license" (Sec. 218.04 (4) (a) Wis. Stats., Appendix D, p. 70), where must be kept a set of books and records (sec. 218.04 (10) (b) Wis. Stats.), open for examination by the appellee for at least six years. (sec. 218.04 (7) (b) and sec. 218.04 (10) (b) Wis. Stats., Appendix D, pp. 72-74)

Appellant and other Metropolitan solicitors are itinerant non-residents who move frequently from town to town and from state to state, working mainly the smaller communities. They are small operators, and often, as in appellant's case, solicitation for Metropolitan is only a part-time activity, carried on while they also seek orders for books or other goods or services. (Record, pp. 46, 49, 56) These solicitors would normally come into Wisconsin only occasionally.

Obviously the expense of maintaining an office in Wisconsin, with its rental, attendant's compensation and other costs, and of keeping books and records there, available to appellee for six years, would be prohibitive and would thus in practice exclude these solicitors from soliciting in Wisconsin. Hence in practical effect this one requirement is prohibitive of the interstate commerce in which appellant wishes to engage in Wisconsin.

The other burdens imposed by the statute and by the appellee's orders issued pursuant thereto, such as the fur-

nishing of a bond, submitting to investigations at the expense of the solicitor, the filing of reports, the use of approved forms, are likewise so severe that when applied to small itinerant solicitors such as appellant they are clearly prohibitive. These burdens are summarized on page 8 above, and need no elaboration.

The burdens placed on Metropolitan as a condition of seeking business in Wisconsin are also substantial, severe and practically prohibitive; and they are material here, because the Wisconsin Supreme Court has held that appellant cannot solicit for Metropolitan unless Metropolitan is itself licensed in Wisconsin. (Appendix C hereto, p. 66)

The requirements made of Metropolitan are summarized on pages 11-12 above.

The single requirement that Metropolitan must maintain "an active office" in Wisconsin, i.e., necessarily an office with someone in charge, (Sec. 218.04 (4)(a) Stats., Appendix D hereto, p. 70), where notices may be served (Sec. 218.04 (5) (b), Stats., Appendix D, p. 71) and in which books and records must be kept, available to inspection by appellee for six years (Sec. 218.04 (10) (b) Stats., Appendix D, pp. 73-74 hereto), which office would be wholly useless to Metropolitan because of its method of operation exclusively by mail from Kansas City, places such a burden on Metropolitan as to invalidate the statute.

> "Under the Constitution of the United States, a State cannot require that a foreign corporation, as a condition of engaging within the State solely in interstate commerce, designate a principal place of business or file an annual statement of condition or satisfy cer-

tain standards in respect to its financial structure or condition."

Restatement of the Law, Conflict of Laws, sec. 175, p. 255.

In addition to the other requirements of an initial fee of $100 and an annual fee of $50, the furnishing of a $5000 bond, submitting to investigations and paying the cost thereof, filing annual reports, etc. (See pp. 11-12 above), Sec. 218.04 (5) (a) requires and the defendant Commissioner has ordered that all amounts collected by the collection agency must be remitted by it to the creditor within thirty days from the end of the month of collection (See General Order, Appendix E hereto, p. 76). Such remittance would operate in many cases to destroy Metropolitan's right to set off commissions due to it and earned on payments made directly to the creditor as the result of Metropolitan's collection efforts. Experience shows that about one-half of all collections resulting from Metropolitan's services are paid by the debtor directly to the creditor (Solicitor's Manual, pp. 10, 17-18, Record p. 62). Unless Metropolitan can set off against funds received by it and due the creditor the commissions due Metropolitan for such collections, it is at the mercy of the creditor. This requirement is prohibitive.

The burdens imposed by sec. 218.04 Wis. Stats. far exceed in relative severity and exclusionary effect many laws which have been held invalid under the commerce clause.

Nippert v. Richmond, 327 U. S. 416 (license fee of $50 plus .005 of gross earnings above $1000)

Furst v. Brewster, 282 U. S. 493 (filing copy of charter and statement of assets and liabilities,

designating general office in state, and agent for service of process.)

Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 218 ($2 license fee)

Stewart v. Mich., 232 U. S. 665, 670 (license without fee)

International Textbook Co. v. Pigg, 217 U. S. 91 (filing purely informational statement)

Caldwell v. N. C., 187 U. S. 622 ($10 annual license fee)

The statutory requirements discriminate against appellant's interstate solicitation.

Where a state statute burdens interstate commerce, it is not saved by the fact that it also applies to local commerce.

Freeman v. Hewitt, 329 U. S. 249, 252.

Jones v. Carter & Weeks Stevedoring Co., 330 U. S. 422, 433.

Brennan v. Titusville, 153 U. S. 289, 304.

This is particularly true where the statute discriminates against out-of-state enterprises in fact, even though not in terms.

"Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern."

Nippert v. Richmond, 327 U. S. 416, 431.

It is apparent that the requirements of maintaining a place of business in Wisconsin with the necessary expenses of rent and the like and of employing someone to be in attendance, and of keeping there a set of books and records open for examination by the appellee for six years, are much more severe burdens on itinerant solicitors such as appellant, who go from place to place and work in a number of states for a non-resident interstate collection agency, than are the same requirements as applied to a local resident of Wisconsin.

In administering the requirement of a fixed place of business, the appellee permits licensees in communities of less than 5,000 population to maintain their offices in their residences. (See Outline of Policy, par. 2, Appendix E hereto, pp. 78-79)

This creates an obvious discrimination against non-residents such as appellant, who solicits business in small communities and who would have to maintain a separate office because he has no residence in Wisconsin.

The requirement that Metropolitan itself maintain an active office and keep books for six years in Wisconsin, (sec. 218.04 (4) (a) and (10) (b) Stats. See Appendix D hereto, pp. 70, 73-74), is also discriminatory in fact, in favor of the local agencies and against collection services performed in interstate commerce. Metropolitan's method of operation by mail requires only one office, the one in Missouri; and the requirement of a supplementary and wholly unnecessary office in Wisconsin is just added expense for a useless appendage. The local Wisconsin collection agency, whose one necessary office is already in that state, is spared this arbitrary burden of a second and useless office.

A similar Colorado statute which required a non-resident automobile dealer to maintain an office in Colorado has recently been held by a three-judge district court to impose an unconstitutional burden on interstate commerce.

Jesse M. Chase Casper Co. v. Fugate, 128 F. Supp. 244 (D. C. Colo. 1955).

It is apparent that if Wisconsin could enforce such a requirement of an economically useless local office, every other state could do the same, and Metropolitan could thus be required to have 48 offices for nation-wide operation, 47 of which would be useless drains on its treasury, preventing it from achieving the economies which makes its service low in cost and attractive to the public.

Similarly, if appellant as an individual solicitor could be required to keep an office and set of books in Wisconsin, he could be required to have one in every other one of the several states in which he works, a patently prohibitive matter to a small itinerant solicitor.

Wisconsin benefits greatly from the freedom of her own enterprises to compete without discrimination in the interstate market, and she must accord a similar freedom to outsiders to enter her territory and compete with her citizens, and incidentally to make their products and services available to the Wisconsin people who want to use them.

The collection agencies operating solely by mail supply a real economic need for creditors residing in small communities—those with less than 10,000 population. Local collection agencies cannot survive in such communities for there is not enough local business to support them. (Solicitors' Manual, p, 2, Record p. 62)

Consequently the enforcement of sec. 218.04 Stats. in preventing Metropolitan and other like collection agencies from operating in Wisconsin would deprive creditors in small communities of a much-needed collection agency service.

Authorities showing the substantial character of the commerce clause question presented by the appeal.

The holding of the Wisconsin court seems quite clearly in conflict with the following decisions of this court:

International Textbook Co. v. Pigg, 217 U. S. 91, holding that a Kansas statute requiring a foreign corporation to file a purely informational statement was an unconstitutional burden on interstate commerce as applied to a Pennsylvania correspondence school for which solicitors solicited subscriptions in Kansas for acceptance in Pennsylvania, the instruction materials and texts being sent to the subscribers by mail. "The state cannot thus burden interstate commerce." (217 U. S. at 111)

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, holding that a city ordinance requiring agents to secure a license, give a $500 bond and pay a quarterly fee of $12.50 as a condition of soliciting orders in Portland, Oregon, to be forwarded to a manufacturer in Indiana for acceptance there, was void because it "materially burdens interstate commerce and conflicts with the commerce clause"; the court also holding that "an expressed purpose to prevent possible frauds" is not "enough to justify legislation which really interferes with the free flow of legitimate interstate commerce." (268 U. S. at 336)

Memphis Steam Laundry Cleaner v. Stone, 342 U. S. 389, holding that a state law requiring persons soliciting business for out-of-state laundries to procure a license and pay a privilege tax of $50 for each county in which solicitation is carried on, imposed an unconstitutional burden on interstate commerce, the court saying:

> "In the long line of 'drummer' cases, beginning with Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 7 S. Ct. 592 (1887), this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce." (342 U. S. 392-393)

Nippert v. Richmond, 327 U. S. 416, holding that a municipal ordinance imposing a license tax on solicitors for goods, imposed an unconstitutional burden on interstate commerce. The court adhered to "the long line of so-called drummer cases" in spite of the contention that "recent trends" required that the drummer cases be overruled (327 U. S. at 417-418, 420), and distinguished *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33 (327 U. S. at 420-431).

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, holding that "the Commerce Clause is infringed by a Texas tax on the occupation of 'gathering gas,' measured by the entire volume of gas 'taken,' as applied to an interstate natural gas pipeline company where the taxable incidence is the taking of gas from the outlet of an independent gaso-

line plant within the state for the purpose of immediate interstate transmission" (347 U. S. 161), the court saying:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." (347 U. S. at 166)

Freeman v. Hewitt, 329 U. S. 249, holding that an Indiana gross income tax imposed an unconstitutional burden on interstate commerce as applied to the receipt by a resident of the state of the proceeds of the sale of securities sent out of the state to be sold. The opinion also points out that

> "It is immaterial that local commerce is subjected to a similar encumbrance." (329 U. S. at 252)

Furst v. Brewster, 282 U. S. 493, in which an Arkansas statute which required every foreign corporation doing business in the state to file a copy of its charter and a statement of its assets and liabilities and designate its general office or place of business in the state and an agent for service of process, under penalty of being unable to make any enforceable contract in the state, was held to violate the Commerce Clause as applied to a sale in interstate commerce, citing the *Pigg* case, 217 U. S. 91. (282 U. S. at 497)

The cases relied on by the court below do not sustain the statute.

The Supreme Court of Wisconsin relied on *Union Brokerage Co. v. Jensen,* 322 U. S. 202, and *California v. Thompson,* 313 U. S. 109, and also cited *Robertson v. California,* 328 U. S. 440, and *Hartford A. & I. Co. v. Illinois,* 298 U. S. 155.

None of these cases involves mere solicitation alone, and consequently they are not in point in a case such as this, where appellant's only activity in Wisconsin is the solicitation of offers to assign accounts for collection. Such activity, as pointed out at pages 15-17 hereof, is an integral and inseparable part of interstate commerce. Certainly the cases referred to cannot be claimed to overrule or even be contrary to the many "solicitor" cases, since there is no intimation in the opinion of any disagreement with the rule of the "drummer" and "solicitor" cases.

Further, in all those cases there was a localized business, with an office or headquarters or localized operation in the state, so that there was a local activity separable from the interstate commerce which the state could regulate.

Thus in *Union Brokerage Co. v. Jensen,* the complaining company had an office and carried on an active customhouse brokerage business at Noyes, Minnesota, buying materials and services in Minnesota, and rendering services in that state, (322 U. S. at 203, 208, 210), so that its business was "localized in Minnesota" (322 U. S. 208, 210, 211).

In *California v. Thompson,* 313 U. S. 109, Thompson arranged for and sold transportation. Appellant sells nothing. Thompson was evidently a resident of the state with a headquarters and place of business in the state and his

business was localized there. All that was involved was a license fee of $1 and a $1,000 bond. The California statute did not contain, as does the Wisconsin statute, burdensome discriminations against a non-resident solicitor, such as the requirement of a local office, etc. The court said:

> "The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it." (313 U. S. at 114)

In the *Robertson* case, the insurance agent not only solicited insurance, but he made a sale of the policy, collected the first quarterly premium by check payable to himself, gave a receipt for the premiums and received the proceeds of the checks, presumably as his commission on the sale. (328 U. S. at 445, 449) Appellant here makes no sales and handles no money. Simply soliciting a list of accounts for collection is not comparable to the semi-professional duties of an insurance counselor.

Moreover, state regulation of the insurance business has consistently been treated more favorably under the commerce clause than in the case of other businesses, first because of the doctrine of *Paul v. Virginia,* 8 Wall 168, that the business of insurance was not interstate commerce, and then under the McCarran Act, of March 9, 1945, (15 U. S. C., sec. 1011) which expressly restored to the states the regulatory powers exercised by them prior to the decision in *United States v. South-Eastern Underwriters,* 322 U. S. 533.

In *Hartford A. & I. Co. v. Illinois,* 298 U. S. 155, the business which the state sought to license was local, "having its situs within the state and being conducted therein," and the licensing law was not avoided by the fact that some of

the farm products sold by the dealer came from outside the state. (298 U. S. at 157-158)

Furthermore, in two of the above cases, the federal government had expressly recognized that the particular activities in question could be subjected to state regulation, and thus in effect had consented thereto.

Thus in *Union Brokerage Co. v. Jensen,* federal treasury regulations provided that customs-brokers might be required by the states to obtain the usual license to do business required of all foreign corporations generally (that being the requirement under attack in that case). 322 U. S. at 208-209.

In the *Hartford* case, a federal licensing act applicable to the same business expressly stated the intention of Congress that the state statutes dealing with the subject matter remain in full force and effect where not inconsistent with the federal act. (298 U. S. at 159)

Appellant's so-called "agency" for Metropolitan cannot save the statute.

The Wisconsin Supreme Court attached significance, both in the *Metropolitan* case, (Appendix G hereto, p. 98) and in the solicitor cases (Appendix C hereto, pp. 62-66) to the question whether the solicitors are independent contractors, employees or "agents." The Circuit Court had regarded this as immaterial, saying that "The issue of employe versus independent contractor has no legal significance upon the *constitutional* question." (Appendix A hereto, p. 47) That is exactly appellant's position. The violation of the commerce clause results from the impact of the stat-

ute on the function the solicitors perform in interstate commerce, and not on their legal relationship to their principal.

Appellant's so-called "agency" is so limited (i.e. solely to the solicitation of offers to assign accounts for collection) that it cannot be maintained that Metropolitan is, solely by reason of such "agency," present and doing business in Wisconsin to the extent that it can be subjected to this type of regulation.

> *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U. S. 389, 392, 393.
>
> *International Textbook Co. v. Pigg,* 217 U. S. 91, 112-114.

The Wisconsin Supreme Court made much of the "Instructions to Solicitors" (Record, p. 64) and the "Solicitors Manual" (Record, p. 62), but these merely contain information as to the kinds of accounts that should be solicited and suggestions as to the method of approaching prospective creditors, with explanations of Metropolitan's service and the answering of possible creditor objections and questions. Neither the "Instructions" or the "Manual" contain anything tending to show that Metropolitan has any control over the details of the solicitors' work such as would make the solicitor an employee or agent of Metropolitan rather than an independent contractor, which he is in fact. See Record, pp. 3-5, 21, 22, 24-25.

The Wisconsin Supreme Court states (Appendix C hereto, p. 66) that *International Textbook Co. v. Pigg,* 217 U. S. 91, rules that the Textbook Company was "doing business" in Kansas, but the court fails to note that while the case held that the Textbook Company was doing business in Kansas sufficient to subject it to the service of process

under the Kansas statute (217 U. S. 105), the court further held squarely that the company was not doing business in Kansas sufficient to justify the attempted regulation of its interstate commerce activities, which was far milder than that here involved (217 U. S. 112, 114). This distinguishing difference is pointed out in many cases holding that the right to provide for the service of process on a foreign corporation is limited only by the due process clause of the Fourteenth Amendment, while the right to regulate the interstate commerce business of a corporation is further limited by the commerce clause. See *Note*, 146 ALR 942, 948.

2. The Question Whether Sec. 218.04 Wis. Stats. Invades a Field Which Congress Has Occupied to the Exclusion of State Regulation.

Sec. 218.04 indicates its purpose "to safeguard the interests of the public" (subsec. (3) (d)) and to "protect the public from oppressive or deceptive practices" (subsec. (7) (a)). See Appendix D hereto, pp. 70-72.

The court below asserted, although without any support in the record, that the statute was adopted largely for the purpose of abating the use of harsh and deceptive contracts by *out-of-state* collection agencies.

The Federal Trade Commission Act

The Federal Trade Commission Act in almost the identical words of the Wisconsin statute, empowers the Commission to prevent "unfair or deceptive acts or practices" in

interstate commerce, (15 U. S. C. sec. 45 (a), Appendix F hereto, p. 79).

That act applies to the interstate collection agency business as carried on by Metropolitan and its solicitors.

> *Bernstein v. Fed. Trade Comm.*, 200 F. 2d 404, 405 (CA 9th Cir. 1949).

In that case the court affirmed an order of the Federal Trade Commission directing Bernstein to cease and desist from engaging in deceptive acts and practices in the conduct of his collection agency business. The business was carried on through independent contractors who solicited accounts for collection, and the court held that such activities constituted "commerce within the meaning of that term as used in the constitution and in the Federal Trade Commission Act," so that the Federal Trade Commission had jurisdiction to enter the cease and desist order. (200 F. 2d 404, 405)

Numerous other cases rule that the Federal Trade Commission Act applies to the interstate collection agency business and show that the Commission has been active in that field.

> *Silverman v. Fed. Trade Comm.*, 145 F. 2d 751, 753 (CA 9th, 1944).
>
> *Independent Directory Corp. v. Fed. Trade Comm.*, 188 F. 2d 468, 469 (CCA 2nd, 1951).
>
> *Rothchild v. Fed. Trade Comm.*, 200 F. 2d 39, 42 (CA 7th, 1952).
>
> *Dejay Stores v. Fed. Trade Comm.*, 200 F. 2d 865, 867, (CA 2nd 1952).
>
> *Bennett v. Fed. Trade Comm.*, 200 F. 2d 362, 363 (CA D. C. 1952).

The Postal Laws

Likewise, the Postal Laws prohibit the use of the mails in conducting a scheme or device for obtaining money by means of false or fraudulent pretenses or representations.

39 U. S. C. sec. 259, (Appendix F hereto, p. 82).

18 U. S. C. sec. 1341, (Appendix F hereto, p. 81).

Consequently, if either Metropolitan or its solicitors should send through the mails any false or misleading letter, they would be subject to the orders and penalties prescribed by the above postal statutes, which are clearly applicable to collection agencies.

Lesselyoung v. U. S., 18 F. 2d 472 (CCA 8th Cir. 1929).

U. S. v. Tamuel, 101 F. 2d 339 (CCA 7th Cir. 1938).

72 C. J. S. ,Post Office, sec. 49, p. 340.

The Congressional action has precluded state regulation.

Congress having occupied the field of preventing unfair and deceptive practices in the interstate collection business, regulation by the state is excluded.

Amalgamated Assoc. v. Wis. E. R. Board, 340 U. S. 383, 399.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 169.

Hines v. Davidowitz, 312 U. S. 52, 68.

Ore.-Wash. R & M Co. v. Washington, 270 U. S. 87, 101-102.

"When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, * * *"

Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 604.

"It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

Bethlehem Steel Co. v. N. Y. Labor Rel. Board, 330 U. S. 767, 772.

For the reasons above stated, the questions presented by this appeal are so substantial as to require plenary consideration.

Respectfully submitted,

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APPENDICES

APPENDIX A
TO JURISDICTIONAL STATEMENT

Opinion of the Circuit Court for Dane County, Wis. in Holman v. Matthews, Meyers v. Matthews and Pinchin v. Matthews (formal parts omitted)

Before Hon. Alvin C. Reis, Judge.

DECISION

Plaintiffs are solicitors of business for Metropolitan Finance Corporation. Whether they are independent contractors or employes of the company, we regard as immaterial *(infra)*.

Metropolitan Finance Corporation is a Missouri corporation. We have held, and the Supreme Court affirmed, that the corporation is engaged in interstate commerce and that the State of Wisconsin has no lawful power to require it to be licensed as a collection agency.

> *Metropolitan Finance Corporation v. Matthews*, 265 Wis. 275.

The *judgment*, which the Circuit Court entered, enjoined the State from enforcing the provisions of the collection agency statute—218.04—against the corporation "or its solicitors." The Supreme Court modified the judgment by striking out the words "or its solicitors," on the ground that (p. 279): "No solicitor was a party to the action."

The present action accordingly is brought by solicitors to determine whether they may be subjected to a state license, either as collection agencies or as solicitors. It is our opinion that they may not be so subjected.

Motion by each plaintiff is for summary judgment. We think that no material issue of fact bars such an adjudication.

Solicitation, as a matter of law, is recognized as the prime essential of the interstate commerce. It is the genesis of the interstate commerce—the alpha, without which such commerce cannot begin. It is the *sine qua non* of the interstate dealing.

The United States Supreme Court decisions on the solicitation, "drummer," text-book cases were cited in our former opinion (*Metropolitan Finance Corporation v. Matthews, Commissioner,* Circuit Court for Dane County, April 2, 1953).

Those Supreme Court decisions, time after time, point to the *solicitation* as being part and parcel of interstate commerce.

The Court stated in *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U. S. 389, 393; 96 L. ed. 436, 440:

> "If the Mississippi tax is imposed upon the privilege of *soliciting* interstate business, the tax stands on no better footing than a tax upon the privilege of *doing* interstate business. A tax so imposed cannot stand under the Commerce Clause." (Our italics).

Solicitation is as if "Interstate Commerce knocks on the local door," the Supreme Court declared in this same *Memphis* case (342 U. S. 389, 392; 96 L. ed. 436, 439-440):

"In the long line of 'drummer' cases, beginning with Robbins v. Shelby County Taxing Dist. 120 US 489, 30 L ed 694, 7 S Ct 592 (1887), this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. *Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate Commerce itself knocks on the local door.'*" (Our italics).

The Supreme Court of the United States has passed specifically on a local ordinance *directed at the solicitors themselves,* which is the gravamen of the present litigation. The case dealt with solicitors *who were employes* of the foreign corporation. The Supreme Court held the ordinance to be void as a material burden upon interstate commerce, and said—*Real Silk Hosiery Mills v. Portland,* 268 U. S. 325, 334-335; L. ed. 982, 984-985:

"Appellant is an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Indiana, and selling it throughout the United States to consumers only. *It employs duly accredited representatives in many states who go from house to house soliciting and accepting orders.* When a willing purchaser is found the solicitor fills out and signs in duplicate a so-called 'order blank.' . . .

"The appellant employs 2,000 representatives, who solicit in most of the important cities and towns throughout the Union, and has built up a very large business—$10,000,000 per annum. Twenty operate in Portland, Oregon.

> "May 16, 1923, that city passed an ordinance *which requires that every person who goes from place to place taking orders* for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond. . . .
>
> *"Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the commerce clause."* (Our italics).

In *Cheney Brothers v. Massachusetts*, 246 U. S. 147, 153; 62 L. ed. 632, 636, the Supreme Court of the United States refers to the *employment* by a foreign corporation of salesmen as sharing the "immunity" from state regulation (in that case taxation), the Court stating:

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. *Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation.* . . . We think the tax on this company was essentially a tax on doing an interstate business, and therefore repugnant to the commerce clause." (Our italics).

The Attorney General in the case now before us, makes a valiant effort—as he did in the earlier Metropolitan Finance Corporation lawsuit—to distinguish "financial transactions" from the selling of text-books and other commodities, and to seek to establish the premise that "there is now a line of authority in cases dealing with financial

transactions under which the state has uniformily been allowed to regulate transactions even though that transaction affected, or was a part of, interstate commerce" (Attorney General's brief, p. 8).

The Attorney General refers to the following *(Ibid):*

Robertson v. California, (1946) 328 U. S. 440, 90 L. ed. 1366, 66 S. Ct. 1160;

Union Brokerage Co. v. Jensen, (1944) 322 U. S. 202, 64 S. Ct. 967, 88 L. ed. 1227;

California v. Thompson, (1941) 313 U. S. 109, 61 S. Ct. 930, 85 L. ed. 1219;

Hartford Acci. & Indem. Co. v. Illinois, (1936) 298 U. S. 155, 56 S. Ct. 685, 80 L. ed. 1099.

One trouble with the foregoing argument is that all these U. S. Supreme Court cases were placed before our Wisconsin Supreme Court in the former Metropolitan Finance case and quite evidently were not regarded as controlling by our Court.

Another difficulty in the present argument is that the *Robertson* and the other three cases referred to as substantiating the "financial transactions" argument, *were decided before Freeman v. Hewitt,* 329 U. S. 249, 91 L. ed. 265, where the Supreme Court was dealing with "pieces of paper" and said (329 U. S. 249, 258-259; 91 L. ed. 265, 275):

> "There remains only the claim that an interstate sale of *intangibles* differs from an interstate sale of tangibles in respects material to the issue in this case. . . . Of course this is an interstate sale. And constitutionally it is commerce no less and no different because

the subject was *pieces of paper* worth $65,214.20, rather than machines." (Our italics).

The Attorney General further maintains herein (brief, p. 12) that the proposed state regulation should be upheld, so long as it does not *discriminate* against persons engaged in interstate commerce, referring to *State v. Helwig,* 262 Wis. 299.

It seems, however, that the mere fact that residents and non-residents, domestic and foreign corporations, may be treated alike, does not prevent the regulation from being an unconstitutional burden upon interstate commerce.

The Supreme Court of the United States declared expressly in *Freeman v. Hewitt,* 329 U. S. 249, 254; 91 L. ed. 265, 272, 273:

> "It is immaterial that local commerce is subjected to a similar encumbrance.
>
> "* * *
>
> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade."

And in *Nippert v. Richmond*, 327 U. S. 416, 431; 90 L. ed. 760, 769, the Supreme Court of the United States said:

> "It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done."

The brief herein of *amicus curiae*—Wisconsin Collectors Association—contends quite forcefully (p. 3 *seq.*) that there are "questions of fact which the court must answer in ruling on the motion for summary judgment"; hence that naturally the motion should be denied.

We do not deem it necessary, however, to analyze the solicitation contract, agreement as to fees, etc., as outlined in the *amicus curiae's* brief. The solicitation arrangements, offer and fee schedule, were before the Circuit Court and our Supreme Court in the former case as Exhibits B and C to the complaint.

The only difference of consequence between the former case and the present one is that it had to be accepted as true in the earlier case that the solicitors were independent contractors, because this was alleged in the complaint and admitted by demurrer. On the contrary, in the instant case defendant has answered instead of demurring and has denied that the solicitors are independent contractors.

We repeat that, in our judgment, the issue of employe versus independent contractor has no legal significance upon the *constitutional* question. We are guided in that thought by those decisions of the Supreme Court of the

United States, *supra*, which were concerned with solicitation, where the solicitors were employes.

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 334-335; 69 L. ed. 982, 984, 985.

Cheney Brothers v. Massachusetts, 246 U. S. 147, 153; 62 L. ed. 632, 635.

We are in accord with the statement in plaintiff Meyer's brief herein (p. 14): "The present case presents the same essential facts [as *Metropolitan Finance Corporation v. Matthews, Commissioner*], and no material new ones except that a solicitor is now in court."

The respective motions of plaintiffs for summary judgment should be granted.

It is so ordered.

Plaintiffs' counsel may prepare and submit to the Attorney General the judgment.

Dated, January 25, 1955.

APPENDIX B
TO JURISDICTIONAL STATEMENT

Judgment of Circuit Court for Dane County, Wis. in Holman v. Matthews (formal parts omitted)

At a general term of the above named Court held at the Court House in the City of Madison, Wisconsin, Present, Hon. Alvin C. Reis, Circuit Judge, presiding.

Defendant having answered plaintiff's complaint, and plaintiff having moved for judgment in accordance with the demand of the complaint; and said motion coming on to be heard before the court on the summons, complaint, defendant's answer thereto, and the affidavits of M. R. Braun and of the plaintiff, Cammie B. Holman, and also the depositions of Cammie B. Holman and H. A. Meyers; and E. L. Wingert of Stroud, Stebbins, Wingert & Stroud, appearing in support of said motion, and Roy G. Tulane, Assistant Attorney General, appearing in opposition thereto, and H. Maxwell Manzer, attorney for the Wisconsin Collectors Association, appearing as amicus curiae, in opposition thereto; and the court having heard the arguments of counsel and having taken the matter under advisement and having filed directions that judgment be entered as hereinafter adjudged:

NOW, on motion of said attorneys for the plaintiff:

IT IS ADJUDGED that plaintiff, whether as agent or independent contractor, is engaged in interstate commerce in soliciting offers to assign accounts to Metropolitan Finance Corporation, and that therefore Sec. 218.04 Wis. Stats. does not apply to plaintiff under these circumstances.

AND IT IS FURTHER ADJUDGED that defendant be and he is hereby enjoined and restrained from enforcing or attempting to enforce said Sec. 218.04 Wis. Stats. against the plaintiff so long as he is so engaged.

Madison, Wisconsin, February 7, 1955.

BY THE COURT:

ALVIN C. REIS
Circuit Judge

APPENDIX C
TO JURISDICTIONAL STATEMENT

Decision and Judgment of the Wisconsin Supreme Court in Holman, Meyers and Pinchin Cases, 270 Wis. 453; 71 N. W. 2d 368 (formal parts omitted)

APPEALS from three judgments and three orders of the circuit court for Dane County, Alvin C. Reis, Circuit Judge.

Pursuant to Wisconsin's Uniform Declaratory Judgments Act (sec. 269.56, Stats.), three separate actions were commenced by H. A. Meyers, Cammie B. Holman, and R. M. Pinchin, plaintiffs, against Guerdon M. Matthews, state commissioner of banks, defendant, to test the validity of sec. 218.04, Stats. as applied to plaintiffs' proposed operations in the state of Wisconsin in soliciting assignments of collection accounts for transmittal to and further action by the Metropolitan Finance Corporation of Kansas City, Missouri. Separate orders and judgments were entered October 28, 1954 and February 7, 1955, respectively. The

orders entered October 28, 1954 denied a motion of the defendant to interplead the Metropolitan Finance Corporation as a party plaintiff. Plaintiffs have stipulated that the record in each case may be considered in passing upon the merits of each of the other cases.

Section 218.04 of the Wisconsin statutes requires solicitors and collectors to pay an annual license fee of $2. It also requires the applicant for a collection agency license to pay "a fee of $100 to the commissioner for investigating the application . . . and the sum of $50 as an annual license fee." In addition, it provides that "the commissioner may require any licensee to file and maintain in effect a bond in the form to be prescribed by the commissioner and acceptable to him, and in such sum as he may determine reasonably necessary to safeguard the interests of the people." There are other provisions by means of which the commissioner is empowered to supervise and control the collection agency business, such as requiring maintainance of a place of business, keeping of books and records which shall be open for inspection, and filing of annual reports.

Plaintiffs are non-residents of Wisconsin. They propose to come into the state of Wisconsin "for extended periods in accordance with the business available, to solicit offers of assignments of accounts from merchants, doctors, hospitals and other creditors. They do no collecting and consider themselves "independent contractors." They have a written contract with the Metropolitan Finance Corporation of Kansas City, Missouri, a foreign corporation, to procure, on a commission basis, offers of assignments. The corporation furnishes them with the forms of contract which they must use in obtaining a listing from a client.

It also furnishes them a "Solicitors Manual" containing "suggestions" as to how to approach and deal with clients, an "Instruction Sheet" containing many details concerning their work, and a sheet showing the commission rates. As soon as they obtain an offer of assignment from a client, they turn it over to Metropolitan, and, if the offer is accepted, Metropolitan mails to them their commissions. The Metropolitan reserves the right to accept or reject offers. After the offer has been turned over to the corporation, it handles the collection of the account entirely through the mail.

Defendant, commissioner of banks for the state of Wisconsin, is in charge of administering the collection agency law (sec. 218.04, Stats.) Upon inquiry of H. A. Meyers and others, he informed them, in effect, that they would be subject to both the solicitors and the collection agency licensing requirements under the commission's interpretation of that law, if they should come into Wisconsin to solicit. He based the latter requirement upon the decision in a previous case, *Metropolitan Finance Corporation v. Matthews*, 265 Wis. 275, 61 N. W. (2d) 502, and stated that this court held there "that the solicitors for the Metropolitan Finance Corporation were independent contractors and not subject to their (the corporation's) direction."

The case of *Metropolitan Finance Corporation v. Matthews, supra* was an appeal to this court to determine whether or not Metropolitan was doing business in Wisconsin. The plaintiff in that case alleged that its solicitors were, in fact, independent contractors, and that allegation was admitted for the purpose of that action by demurrer. This court determined that Metropolitan was not doing

business in this state "*so long as* the solicitors are independent contractors *and not subject to the direction of the plaintiff.*" No solicitors were present in that case, and, contrary to the statement in the commissioner's letters, this court did not pass upon the status of persons in the position of plaintiffs in the cases now on appeal.

It is alleged in the complaint of plaintiff H. A. Meyers that:

> "10. Properly construed, said section 218.04 does not prohibit the conduct of plaintiff's business when carried on as above set forth, nor does said section, properly construed apply to plaintiff's business as so conducted; nor can the defendant's said rules and regulations lawfully apply thereto.
>
> * * *
>
> "12. Said section 218.04, if construed as aforesaid, is invalid and ineffective because it attempts to regulate interstate commerce in a field which has been preempted by congressional legislation and constitutes a burden on interstate commerce contrary to section 8 of Article I of the Constitution of the United States."

Defendant admitted in his answer:

> "that he has informed plaintiff that if plaintiff solicits accounts for collection, plaintiff will also need a solicitor's license and must comply with all provisions and requirements of sec. 218.04 and the orders of defendant relating to collection agencies and solicitors for such agencies."

Answering further, defendant alleged:

> "that the issue of whether or not the business of plaintiff as described in the complaint herein is that

of an independent contractor was not passed upon in the case of *Metropolitan Finance Corporation v. Matthews* 265 Wis. 275 for the reason that plaintiff in that case alleged that its solicitors were in fact independent contractors and that allegation was admitted for the purpose of that action by demurrer. Further, that the court in the opinion quoted ruled that it could not pass upon the status of persons in the position of plaintiff herein for the reason that no such person was in court."

Defendant alleges in answer to par. 12 of plaintiff's complaint:

> "that if the plaintiff does business as set forth in the complaint he will be doing business in the state of Wisconsin as a person present in Wisconsin dealing with Wisconsin residents, and that any principal for whom he purports to, and is authorized to, act will be doing business within the confines of the state of Wisconsin."

Defendant, in his answer also put in a separate defense that if, on all facts, it were found that the plaintiff was an agent of Metropolitan Finance Corporation, then such corporation was also present and doing business within the state of Wisconsin and was a necessary party to the action.

A motion to sustain this separate defense was supported by the following affidavit:

> "Roy G. Tulane, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendant in the above entitled action and makes this affidavit in his behalf in support of a motion to sustain a separate answer and to interplead the Metropolitan Finance Corporation of 1129 West 41st Street,

Kansas City 11, Missouri as a party plaintiff in the above entitled action.

"That the complaint on file in the above entitled action shows on its face that there is an issue involved herein as to whether plaintiff herein is an employe or agent of the said Metropolitan Finance Corporation, and that said issue cannot be finally adjudicated in a manner that will settle the controversy raised by this litigation without the presence of said corporation.

"That the said corporation is the real party in interest in the above entitled action, and that responsible officers of said corporation have informed Roy Lund, an investigator for the Commissioner of Banks, that they cannot do business in Wisconsin unless they can send their solicitors into Wisconsin."

In the judgment granted in the action in which H. A. Meyers was plaintiff, it was adjudged:

"that plaintiff, whether an agent, or independent contractor, is engaged in interstate commerce in soliciting offers to assign accounts to Metropolitan Finance Corporation, and that therefore sec. 218.04 Wis. Stats. does not apply to plaintiff under these circumstances.

"And it is further adjudged that defendant be and he is hereby enjoined and restrained from enforcing or attempting to enforce said sec. 218.04 Wis. Stats. against the plaintiff so long as he is so engaged." Defendant appeals.

FAIRCHILD, C. J. Respondents are non-residents of Wisconsin who propose to work within its borders in the manner outlined in the foregoing statement of facts. They claim to be independent contractors. Their first contention

is that they are exempt from the Wisconsin collection agency law by the fact, *per se,* of being engaged in interstate commerce; and that sec. 218.04, Stats. is discriminatory against and places an undue burden upon interstate commerce.

Appellant bank commissioner contends, on the other hand, that such collection agency statute is a regulatory police measure which the state has authority to impose upon persons working within its borders, and that it places no undue burden upon interstate commerce either by way of prohibitive fees or discriminatory provisions.

The collection agency law was created by ch. 358, Laws of 1937 largely for the purpose of abating the then-existing vices of out-of state collection agencies, arising out of their use of harsh and deceptive contracts. The records of the banking department show that after passage of that law, none of the then-existing foreign mail order collection agencies attempted to qualify under the Wisconsin law, and the vices aimed at by the legislature ceased.

It is obvious that an annual license fee of $2 is not a tax, as it barely covers the administrative costs of issuing such license. The same is true of a $50 fee for an agency license. In *Union Brokerage Company v. Jensen,* (1944) 322 U. S. 202, 64 S. Ct. 967, 88 L. ed. 1227, it was held that "the burden . . . a fee of fifty dollars, is sufficiently small to fairly represent the cost of governmental supervision." Considering the time and work involved in investigating an applicant for a collection agency license, a fee of $100 cannot be held to be exorbitant or prohibitive. This fee is paid once and once only, unless very extensive investigation is necessary, in which case an additional amount may

be required in a particular case. As said in the *Union Brokerage case, supra,* the test of a reasonable fee is that it shall be no greater than is sufficient to cover the expenses of administration. The bond which the bank commissioner has the power to require under sec. 218.04, Stats. is not a tax, because its proceeds do not inure to the benefits of the State. It is merely a means authorized by the legislature "to safeguard the interests of the public." It is not the license, but the purpose behind it which is important. After requiring a license and fixing fees, the statute in its remaining provisions aims to safeguard the interests of the public and protect it "from oppressive and deceptive practices." The provisions with respect to maintaining a place of business, keeping books and records which shall be open for inspection, and submitting reports are similar to provisions considered in numerous U. S. Supreme Court cases which have upheld the right of the state to control persons working within its borders, even though those persons are engaged in interstate commerce. "The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into the state." *Union Brokerage Company v. Jensen, supra.* As was said in *California v. Thompson,* (1941) 313 U. S. 109, 61 S. Ct. 930, 85 L. ed. 1219, the statute is not shown to be other than what on its face it appears to be, a measure to safeguard the members of the public . . . who are peculiarly unable to protect themselves from fraud and over-reaching of those engaged in a business notoriously subject to those abuses."

The Wisconsin collection agency law does not impede the flow of interstate commerce by placing upon it an undue burden either as to discriminatory or prohibitive fees or by other discriminatory provisions. The provisions of the statute apply equally to those engaged in intra-state commerce and to those engaged in interstate commerce.

The field of regulation of collection agencies and solicitors for the purpose of protecting the interests of the public has not been pre-empted by Congress. In the absence of the barriers of discrimination and undue burden, a state may pass regulatory laws to protect its residents from fraud and unconscionable conduct by out-of-state collection agencies who maintain representatives within the borders of the state. In *California v. Thompson, supra,* at page 113, it was stated:

> "As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respects to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Willson v. Black Bird Creek Marsh Co.,* 2 Pet. 245, and *Cooley v. Board of Port Wardens,* 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of

commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints."

Speaking along the same line, Mr. Justice Frankfurter, in the *Union Brokerage case, supra*—a case in which the federal government itself required a license to protect its own interests in matters of *national* concern—stated at page 208:

"The Federal Government has recognized that there is such a proper field for state regulation complementary to federal regulation, for the Treasury has provided that 'a licensee having a (federal) license in force in one district may on application to the Committee be granted a license to transact business in another district without further examination, *provided it appears on investigation that the licensee is authorized to do business in the state or states in which such other district is situated.*' . . . Those who are responsible for protecting the interests of the revenue as well as of commerce have thus given emphatic indication that a state has a legitimate interest in the regulation of those engaged in the brokerage business within its borders. Where the government has provided for collaboration the courts should not find conflict." Citing *Savage v. Jones,* 225 U. S. 501, and *Kelly v. Washington,* 302 U. S. 1.

It would be possible to quote extensively from other U. S. Supreme Court decisions holding to the same effect, but we deem it sufficient to cite, in addition to the above cases: *Robertson v. California,* (1946) 328 U. S. 440, 90 L.

ed. 1366, 66 S. Ct. 1160; *Hartford Accident & Indemnity Co. v. Illinois,* (1936) 298 U. S. 144, 46 S. Ct. 685, 80 L. ed. 1099; *State v. Helwig,* (1952) 262 Wis. 299, 54 N. W. (2d) 907, and cases cited in those and the above referred to decisions.

It is to be noted that, with the development of the law, in determining questions arising under the Constitution as to the spheres in which the police power of the states and federal government are permitted to operate, the courts have been more and more mindful of the possible disturbance of the mixed and complicated balance of our political system and the dangers of removing a protective authority too far from the locality needing protection. The more recent cases of the U. S. Supreme Court have abandoned the rule seemingly imposed by earlier cases, requiring states to maintain a "hands off" policy with respect to attempted state regulation if it even so much as touched interstate commerce. The more recent cases adopt the rule that in the absence of discrimination or undue burden resulting from state regulation, where Congress has not already legislated, a state may exact licenses and reasonable fees as well as conformance with provisions designed to assure the responsibility of out-of-state concerns and their integrity in dealing with the residents of the state, even where such concerns are engaged in interstate commerce. A case in point is *Di Santo v. Pennsylvania,* (1927) 273 U. S. 34, 47 S. Ct. 267, 71 L. ed. 524, formerly relied on by interstate commerce businesses in claiming immunity from state regulation, but since overruled with the result that it is no longer controlling authority:

> "The decision in the *Di Santo Case* was a departure from this principle which has been recognized since

Cooley v. Port Wardens, 12 How (US) 299, 12 L. ed. 996, supra. It cannot be reconciled with later decisions of this Court which have likewise recognized and applied the principle, and it can no longer be regarded as controlling authority." *California v. Thompson, supra,* at page 116.

In holding as it did in the present case, the trial court apparently followed the now discarded doctrine of the earlier cases that if a person or corporation was engaged in interstate commerce, that fact of itself rendered such person or corporation immune from state regulation. In its decision it relied heavily upon *Real Silk Hosiery Mills v. Portland,* 268 U. S. 325, L. ed. 982 and *Memphis Steam Laundry Cleaner, Inc. v. Stone,* (1952) 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436; and cited the so-called "drummer cases." These cases are clearly distinguishable from the present case, because the holding of unconstitutionality of attempted state regulation in such cases was based upon discrimination and undue burden. In the *Real Silk Hosiery Case,* it was not a state statute but a city ordinance which was involved. Manifestly if every municipality in the state were allowed to exact a license, then the total sum of such licenses could prove so prohibitive as to put an undue burden upon interstate commerce and impede its free flow.

The trial court further advances the theory that if the U. S. Supreme Court cases hereinbefore cited in support of our conclusion were not controlling in *Metropolitan Finance Corporation v. Matthews, supra,* they therefore, cannot be controlling here. That reasoning does not follow. In the *Metropolitan case, supra,* it was held only that Metropolitan was not doing business in the state of Wis-

consin "so long as its solicitors were independent contractors and not subject to the direction of the plaintiff." If Metropolitan was not doing business in Wisconsin under the facts as alleged, of course Wisconsin could not use its police power to regulate the corporation. But even there, it was held by this court that if Metropolitan had been doing business in this state, Wisconsin would have had constitutional authority to exercise its police power under sec. 218.04, Stats., and the Court quoted from *United States v. Southeastern Underwriters Asso.*, 322 U. S. 533, 547, 64 Sup. Ct. 1162, 88 L. ed. 1440 enunciating principles in support of our conclusion.

The novel contention in the present case is that respondents are independent contractors who procure lists of delinquent accounts, turn them over, or "sell" them, to Metropolitan, and that then they are "through." The implication is that respondents play an outside role apart from the collection agency business because they have nothing to do with the collecting of accounts. Such a concept of separation of a collection agency from its solicitors is too unrealistic to be supported by the evidence and is not contemplated by and would render void the Wisconsin law under sec. 218.04, Stats., which has for its purpose the protection of the public interests.

An affidavit submitted by appellant declares that Metropolitan admitted to one of appellant's employes that it (Metropolitan) could not do business without its solicitors. Under the evidence in the present case, the respondents are sufficiently under the direction of Metropolitan to show that their true relationship is one of principal and agent.

When presented with a copy of a sheet entitled "Instructions to Solicitors," Mr. Holman testified:

> "It is just more or less to outline the kind of accounts this company would accept and what they will not accept, *and what the solicitor can do and what he can't do.*"

That instruction sheet contains very minute details as to how a solicitor is to work, with whom he may deal or may not deal, what forms he must use, how he must fill them out, what information must be furnished, what accounts may or may not be accepted, restrictions as to what he may tell his client, and when commissions will be withheld and when they will be paid.

In addition to the instruction sheet a "Solicitor's Manual" is published by Metropolitan and issued to its solicitors. This Manual assumes all of the important problems which may arise between the solicitor and his client and specifically advises the solicitor how to handle such problems.

Although Mr. Holman testified that he was not restricted or controlled by the corporation as to the area in which he could work, he later admitted that a solicitor could obtain an assignment of an exclusive territory upon condition that he had 200 listings or more. In such a case, then, Metropolitan would be directing not only the details of the work but also the place of that work both as to the exclusive agent and as to other solicitors who would be forbidden to do business in the excluded territory. Furthermore, Metropolitan reserves the right to accept or reject offers of assignment in its own discretion.

The only control, then, that the solicitor has over his work is as to physical activities, such as time and manner of travelling. Such self-controlled activities are not sufficient to preclude agency.

The inseparable relation between the respondents and Metropolitan is further evident from the manner in which each refers to the other in the conduct of their business transactions. The solicitor's contract form received and used by Mr. Holman in 1949 refers to him, in the upper right hand corner as "district representative" and at the bottom as "your representative." Even though that reference has lately been changed to read "solicitor," Metropolitan has not changed its method of operating, and the reference in the forms received by Mr. Holman in 1949 are indicative of the true relationship between Metropolitan and its solicitors.

Further, Mr. Holman testified that in introducing himself to a prospective client he used the following language:

> "Mr. Smith, this is C. B. Holman speaking, from the Metropolitan Finance Corporation. My firm, Mr. Smith, specializes in the handling of professional accounts, mostly delinquent accounts. We find that we are not dealing with you, although we carry a large portion of that business throughout the country. So I called more or less to make you acquainted with our service. . . ."

That is exactly the same form of introduction which solicitors of Metropolitan are told to use in the "Solicitor's Manual" issued to them by the corporation. From the testimony it is noticeable that in talking with his clients Holman identifies himself with the corporation by the use

of the terms "we," "our," "my firm," "on behalf of." That the impression made by the solicitor upon his client is one of identity with the corporation is shown by the wording in a letter from a client, quoted in part as follows:

> "I would like to commend the Metropolitan and their representative, Mr. Holman."

An agent is described in Restatement on Agency, vol. 1, sec. 1, p. 10 as:

> "a person authorized by another to act on his account and under his control. Included within its meaning are both those who, whether or not servants . . . act in business dealings and those who, being servants, perform manual labor. An agent may be one who, to distinguish him from a servant in determining the liability of the principal is called an independent contractor. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, *although as to their physical activities, they are independent contractors.*"

Agency may be of a general or special character, and soliciting agents are agents of a special nature. An agent having authority only to solicit applications and forward them to the home office is a "soliciting agent." 39 Words and Phrases, p. 621; *Rozgis v. Missouri State Line Ins. Co.*, 271 Ill. App. 155, 157. An agency is created by contract, express or implied. "The relation arises when one is authorized to represent another in bringing or to aid in bringing the latter in contractual relation with a third party, however such authority may be conferred." 2 Words and

Phrases, p. 725; *Keyser v. Hinkle,* 127 Mo. App. 62, 106 S. W. 98, 100.

In *International Textbook Company v. Pigg,* (1910) 217 U. S. 91, 54 L. ed. 678, it was determined by both the lower court and the U. S. Supreme Court that there was no question but that International Textbook Company was doing business in Kansas through the maintenance of a force of agents in that state.

Metropolitan unquestionably is doing business, and it is doing that business with the aid of its solicitors. Therefore, when its solicitors are present in Wisconsin, Metropolitan is present and doing business in Wisconsin. The true relation shown by the evidence to exist between Metropolitan and its solicitors is one of principal and agent. It does not matter for the purposes of this case whether the respondents may be a type of independent contractor or not. We are not concerned here with tort liability or workmen's compensation. What is important here is that the solicitors are agents of Metropolitan.

Under all the evidence, Metropolitan itself is reaching, through its agents, into Wisconsin and dealing with the people of Wisconsin. The respondents' right to engage in the activities of solicitors and to create the incidences connected with doing a collection agency business stems from the primary licensing of the collection agency.

Under the facts, Metropolitan and its solicitors would be subject to the provisions of sec. 218.04, Stats. and the statute is not under any condemnation arising from restrictions burdening interstate commerce.

This is not a reversal of *Metropolitan Finance Corporation v. Matthews, supra.* The difference between the present case and that case cannot be too strongly emphasized. The determination there that Metropolitan was not doing business in this state is based wholly upon a hypothetical condition regarding the status of its solicitors, who were not present in that case. This court there very carefully pointed out that "*so long as* the solicitors are independent contractors *and not subject to the direction of the corporation,*" the Metropolitan would not be doing business in this state. In the present case we have determined the true status of the solicitors, who are the respondents. We have shown that they are subject to the direction of the corporation, that they are in fact agents of the corporation; and that it is not important whether or not they are independent contractors from the standpoint of imposing liability upon Metropolitan for their torts.

By the Court: The judgments are reversed, and the causes are remanded with instructions to vacate the judgments and dismiss the complaints.

APPENDIX D
TO JURISDICTIONAL STATEMENT

State Statute Involved

(Wisconsin Collection Agency Law, Sec. 218.04 Wis. Stats. 1953—formal parts omitted)

218.04 LICENSING COLLECTION AGENCIES. (1) DEFINITIONS. The following terms, as used in this section, shall have the meaning stated, unless the context requires a different meaning:

(a) "Commissioner" means the state commissioner of banks.

(b) "Person" includes individuals, partnerships, associations and corporations.

(c) "Licensee" means a person licensed under this section.

(d) "Special order" means an order against a person.

(e) "General order" means an order which is not a special order.

(f) "Collection Agency" means any person engaging in the business of collecting or receiving for payment for others of any account, bill or other indebtedness. It shall not include attorneys at law authorized to practice in this state and resident herein, banks, express companies, building and loan associations organized under the laws of Wisconsin, insurance companies and their agents, trust

companies, or professional men's associations collecting accounts for its members on a non-profit basis, where such members are required by law to have a license, diploma or permit to practice or follow their profession, real estate brokers, real estate salesmen and justices of the peace whose principal business is not collections.

(g) "Collector" or "solicitor" means any person employed by a collection agency to collect or receive payment or to solicit the receiving or collecting of payment for others of any account, bill or other indebtedness outside of the office.

(2) LICENSES REQUIRED. No person shall operate as a collection agency or as a collector or solicitor in this state without first having obtained a license as required by this section.

(3) LICENSES; APPLICATIONS; FEES; BONDS. (a) Application for license under the provisions of this section shall be made to the commissioner in writing, under oath, on a form to be prescribed by the commissioner. All licenses shall expire on June thirtieth next following their date of issue.

(b) At the time of making application every applicant for a collection agency license shall pay a fee of $100 to the commissioner for investigating the application, unless the applicant is already licensed hereunder, and the sum of $50 as an annual license fee. In the event the cost of investigation exceeds $100, the applicant shall, upon demand of the commissioner, pay the excess cost. No investigation fee shall be required on the renewal of a license.

(c) The license fee for a collector or solicitor shall be two dollars. This license shall be carried as a means of identification whenever the collector is engaged in business. The license shall state the name of the employer and in case of a change of employer the commissioner shall endorse such change on the license without charge.

(d) The commissioner may require any licensee to file and maintain in force a bond, in a form to be prescribed by the commissioner and acceptable to him, and in such sum as he may deem reasonably necessary to safeguard the interests of the public.

(4) ISSUANCE OR DENIAL OF LICENSES. (a) Upon the filing of such application and the payment of such fee, the commissioner shall make his investigation, and if he finds that the character and general fitness and the financial responsibility of the applicant, and the members thereof if the applicant is a partnership or association, and the officers and directors thereof if the applicant is a corporation, warrant the belief that the business will be operated in compliance with this section the commissioner shall thereupon issue a license to said applicant. Such license is not assignable and shall permit operation under it only at or from the location specified in the license. A nonresident of this state may, upon complying with all other provisions of this section, secure a collection agency license provided he maintains an active office in this state.

(b) No licensee shall conduct a collection agency business within any office, room or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as may be authorized in writing by the department upon its finding that the char-

acter of such other business is such that the granting of such authority would not facilitate evasion of this section or the lawful orders issued thereunder.

(5) REVOCATION; SUSPENSION; REINSTATEMENT OF LICENSES. (a) The commissioner may suspend or revoke any license issued under this section if he finds that 1. the licensee has violated any of the provisions of this section or any lawful order of the commissioner made thereunder or 2. any fact or condition exists which, if it had existed at the time of the original application for such license, would have warranted the commissioner in refusing to issue such license; or 3. the licensee has failed to pay the annual license fee or to maintain in effect the bond required under subsection (3) (d) or 4. the licensee has failed to remit money due to any and all claimants or forwarders within 30 days from the close of the month during which the collection was effected.

(b) No license shall be revoked or suspended except after a hearing. A complaint stating the grounds for suspension or revocation together with a notice of hearing shall be delivered to the licensee at least 5 days in advance of the hearing. In the event the licensee cannot be found, complaint and notice of hearing may be left at the place of business stated in the license and this shall be deemed the equivalent of delivering the notice of hearing and complaint to the licensee.

* * *

(7) POWERS OF COMMISSIONER; ADVISORY COMMITTEES. It shall be the duty of the commissioner and he shall have power, jurisdiction and authority to investigate the condi-

tions and ascertain the facts with reference to the collection of accounts and upon the basis thereof

(a) To issue any general or special order in execution of or supplementary to this chapter to protect the public from oppressive or deceptive practices of licensees and to prevent evasions of this chapter.

(b) For the purpose of discovering violations of this section the commissioner may cause an investigation to be made of the business of the licensee transacted under the provisions of this section, and shall cause an investigation to be made of convictions reported to him by any district attorney for violation by a licensee of any of the provisions of this section. The place of business, books of accounts, papers, records, safes and vaults of said licensee shall be open to inspection and examination by the commissioner or his representative for the purpose of such investigation and the commissioner shall have authority to examine under oath all persons whose testimony he may require relative to said investigation. The cost of the first investigation or examination during any licensing year shall be paid by the licensee, but the cost of additional investigation or examination during such year shall be paid by the licensee only if such examination discloses violation of subsection (5) (a) 4 of this section. Said cost shall be determined by prorating the amount of salaries and expenses of all examiners, employes and other persons engaged in examining licensees under this section, if any, and any other expenses which may be attributable thereto. The licensee shall pay the cost of any hearing including witness fees, unless it be found by the commissioner, board of review or court that licensee has not violated any pro-

vision of this section. All said costs shall be paid by the licensee within 30 days after demand therefor by the commissioner. The state may maintain an action for the recovery of such costs and expenses in any court of competent jurisdiction.

* * *

(9m) (a) If the commissioner finds that a licensee is insolvent or that he has collected accounts but has failed to remit money due to any claimant or forwarder within 30 days from the end of the month in which collection was made, and it is necessary to protect the interest of the public or when the license of a collection agency has expired or has terminated for any reason whatsoever, he may take possession of the assets and the books and records of the licensee for the purpose of liquidating its business, and for such other relief as the nature of the case and the interest of the claimants or forwarders may require.

* * *

(10) ANNUAL REPORT; RECORDS. (a) Each licensee shall annually, on or before the fifteenth day of March, file a report with the commissioner giving such reasonable and relevant information as the commissioner may, by general or special order, require concerning the business and operations conducted by such licensee within the state. Such report shall be made under oath and shall be in the form prescribed by the commissioner.

(b) The commissioner shall require the licensee to keep such books and records in his place of business as will enable the commissioner to determine whether the provisions of this section are being complied with. Every

such licensee shall preserve the records of final entry used in such business for a period of at least 6 years after final remittance is made on any account placed with the licensee for collection or after any account has been returned to the claimant on which one or more payments have been paid.

(11) SUBTERFUGE. The provisions of this chapter shall apply to any licensee or other person who, by any device, subterfuge or pretense whatever, shall make a pretended purchase or a pretended assignment of accounts from any other person for the purpose of evading the provisions of this section.

(12) PENALTIES. Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, for each and every such offense shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

(13) ENFORCEMENT. It shall be the duty of the commissioner and he shall have power, jurisdiction and authority to investigate, ascertain and determine whether this section or the lawful orders issued hereunder are being violated and for such purposes the commissioner shall have all the powers conferred by subsections (4) and (5). The commissioner shall report all violations to the district attorney of the proper county for prosecution.

* * *

APPENDIX E
TO JURISDICTIONAL STATEMENT

General Order and Statement of Policy of Commissioner of Banks Under Sec. 218.04, Wis. Stats.

State of Wisconsin Commissioner of Banks

In the matter of the regulation of
licensees under Section 218.04

ORDER

(Non-essential parts omitted)

The Commissioner of Banks of Wisconsin being empowered under the provisions of Section 218.04 to make all necessary orders, rules and regulations for the administration and enforcement of said section, hereby orders that:

1. All agreements, contracts, listing sheets, acknowledgment forms, form letters, or any other forms whatsoever to be used by any licensee in conducting its business shall be submitted to the Commissioner for his approval and no such form or agreement shall be used until approved by the Commissioner.

2. Upon receipt of any account for collection, the licensee shall furnish the claimant or forwarder with an agreement, listing or acknowledgment, a duplicate copy of which shall be kept in the office of the licensee. This agreement, listing or acknowledgment shall:

(A) State the date the account was received;

(B) Confirm the rate of charge and any other terms or conditions binding thereon;

(C) List the accounts by name of debtor, amount to be collected, amount of authorized interest or other charges to be added;

(D) Contain the following statement:

"In the event that the license of this collection agency is terminated for any reason whatsoever, all accounts and any valuable papers which you have given to us in connection with your accounts shall be returned to you within five days of the termination of said license (unless upon written application an extension of time is granted by the Commissioner of Banks), and any agreement between you and this collection agency is automatically cancelled as of the date on which said license is terminated. If any of the above referred to accounts are in the hands of attorneys or others at the termination of said license, such attorneys or others shall immediately be notified by us to thereafter correspond, remit and be solely responsible direct to you on all such accounts. In case of death, the accounts shall be returned within a reasonable perioc' of time, but in any event not to exceed 120 days."

3. Remittance due to any claimant or forwarder within thirty days from the close of the month during which the collection was effected, as required by Section 218.04 (5) (a) (4), shall be accompanied by a remittance statement setting forth:

(A) Date of remittance

(B) Debtor's name

(C) Amount collected from the debtor

(D) Distribution of monies collected showing:

(1) Amount due licensee as commission

(2) Amount due claimant or forwarder

(E) The number and amount of the remittance check

A duplicate copy of this remittance statement so furnished shall be kept available in the office of the licensee for at least six years.

4. Every licensee shall have available for inspection by the Commissioner for a period of at least six years, adequate accounting records with respect to accounts placed with such licensee for collection, which shall include the following:

(A) The duplicate copy of the consecutively numbered receipt which the licensee is required to furnish the debtor for each payment received.

(B) A record of each debtor's account showing the following information:

(1) Original amount owing and date of last credit or debit

(2) Authorized charges with a description thereof

(3) Date and amount of debtor's payments

(4) Amount retained by licensee as commission

(5) Amount and date of remittance made to claimant or forwarder

(6) Name and address of forwardee if licensee forwards account to some other individual or agency for collection.

(C) A master alphabetical listing by name and address of every claimant, forwarder or forwardee with whom the licensee engages in the business of collecting accounts.

* * *

Dated this 6th day of August, 1949.

Commissioner of Banks
William E. Neusse, Deputy Commissioner

Published August 12, 1949.
Effective September 12, 1949.

OUTLINE OF POLICY ADOPTED BY THE STATE BANKING DEPARTMENT IN ADMINISTERING THE COLLECTION AGENCY LAW

(Non-essential parts omitted)

1. In conducting business, licensee may use only the name shown on the license granted by the State Banking Department. A separate division of the business may be operated in the same office and under a different name, provided that all forms, advertising and letterheads used designate it as a division of the business named in the license and display both names with equal prominence and in the same size type or print. Written permission shall be obtained from the State Banking Department.

2. Licenses will not be granted to applicants who share quarters or office space, or have a common waiting room with a practicing attorney or justice of the peace, nor will licenses be granted to applicants in communities of 5,000

or more inhabitants by the last official census where said applicants maintain or contemplate maintaining an active office in a residence.

* * *

APPENDIX F
TO JURISDICTIONAL STATEMENT

Federal Statutes Involved

FEDERAL TRADE COMMISSION ACT
(Non-essential parts omitted)

Sec. 45. *Unfair methods of competition unlawful; prevention by Commission.*

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. As amended July 14, 1952, c. 745, sec. 2, 66 Stat. 632.

15 U. S. C. A. Supp. Sec. 45, pp. 3-4.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person,

partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

15 U S. C. A., Sec. 45, pp. 10-11.

MAIL FRAUD LAWS

18 U. S. C. Sec. 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisonment not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, sec. 34, 63 Stat. 94.

18 U. S. C. A., sec. 1341, p. 346.

39 U. S. C. Sec. 259. Mail of persons conducting lotteries or fraudulent schemes returned; evidence of agency.

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from

ascertaining the existence of such agency in any other legal way satisfactory to himself. (R. S. § 3929; Sept. 19, 1890, c. 908, § 2, 26 Stat. 466; Mar. 2, 1895, c. 191, § 4, 28 Stat. 964.)

39 U. S. C. A., sec. 259, p. 104

APPENDIX G
TO JURISDICTIONAL STATEMENT

Opinion of Circuit Court for Dane County, Wis., Hon. Alvin C. Reis, Circuit Judge, in Metropolitan Finance Corporation v. Matthews, 265 Wis. 275 (formal parts omitted)

Plaintiff seeks a declaratory judgment (and an injunction). Defendant (brief, first page) agrees that the case is a proper one for declaratory relief. There is a "justiciable controversy."

Defendant Commissioner of Banks has advised plaintiff (plaintiff's brief, pp. 3-4) that if plaintiff attempts to conduct its business in the manner hereinafter outlined, it will—so far as Wisconsin is concerned—be subject to penalties; that, before engaging in its customary activities—so far as Wisconsin is concerned—it will have to have a collection agency license, furnish a bond of $5000.00 or more, maintain an active office in Wisconsin and comply generally with 218.04 as to collection agencies and orders issued thereunder—likewise, that plaintiff's "solicitors" will have to be licensed, bonded, etc.

Plaintiff's position is that what it proposes to do is strictly *interstate commerce* and that defendant Commis-

sioner of Banks of Wisconsin has no lawful power to interfere with its proposed operations by the restrictions threatened to be imposed.

The following is a clear-cut and, we take it, accurate description of plaintiff's method of operation as outlined in plaintiff's brief (pp. 2-3):

> "Plaintiff is a Missouri corporation with its principal office in Kansas City, Missouri, and is engaged in the business of collecting by mail unpaid accounts throughout most of the states, and desires to undertake collection of accounts owing to Wisconsin residents in the same manner.
>
> "Plaintiff's business is conducted by employing residents of a state, called solicitors, to secure from merchants, doctors, hospitals and other creditors in that state, offers to assign accounts and notes to plaintiff for collection by the plaintiff for the assignors.
>
> "The solicitors are obtained solely through newspaper advertisements and the use of the mails, and are employed on written contracts (Exhibit A of complaint) which become effective only on acceptance by plaintiff at Kansas City, Missouri.
>
> "The solicitors procure written offers (Exhibit B of Complaint) to assign accounts and notes, which assignments are forwarded by mail to plaintiff at Kansas City for acceptance or rejection, and, when accepted, become by their terms effective as agreements between plaintiff and the assignors.
>
> "The solicitors are paid by plaintiff for securing the assignments by checks on banks located outside of Wisconsin immediately upon plaintiff's acceptance of the assignments, on a schedule of fees (Exhibit C

of Complaint) agreed upon between the solicitors and plaintiff.

"Upon such acceptance and payment of the solicitor's fees, the solicitor's connection with the assignors and with the assigned accounts and notes is terminated, and the solicitors have no right, but are expressly forbidden, to collect or attempt to collect the assigned accounts or to contact in any manner the persons owing the accounts.

"Upon acceptance of the assigned accounts, plaintiff undertakes their collection for the assignors *solely by sending letters and notices by mail to the debtors*, and plaintiff employs no collectors to call upon the debtors, and has no personal contact of any kind with them.

"Upon making collection of any part of any assigned account, plaintiff immediately remits by mail to the assignor the sum so collected after deducting the agreed collection fee set forth in the assignment of the account.

"The only activity that would be carried on in Wisconsin by or on behalf of plaintiff is the solicitation of assignments of accounts by the solicitors."

The foregoing depiction, we are convinced, under the preponderance of authorities, represents interstate commerce and beyond the lawful power of Wisconsin to penalize or license or bond or otherwise circumscribe.

From the *Pigg* case of 1910 down to the *Memphis* decision in 1952, over forty years of judicial history in the Supreme Court of the United States in adjudication after adjudication *(infra)* stamp the present litigation, in our judgment, as one involving interstate commerce, only.

Many of these cases reflect perfect counterparts of the instant controversy. Nothing was done within the state except to solicit. This in each instance was held not sufficient to bring the subject within state jurisdiction.

The historic statement in *International Text-Book Company v. Pigg*, 217 U. S. 91, 101, 54 L. ed. 678, 685 spreads the gamut from the realm of physical goods to the domain of *information* as within the all-embracing category of interstate commerce. This "early" decision said:

> "Importation into one state from another is the indispensable element, the test of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

International Text-Book Co. v. Peterson, 218 U. S. 644, 54 L. ed. 1201 *reversed* the Supreme Court of Wisconsin in a case of the same title in 133 Wis. 302. This was on the authority of the *Pigg* decision.

The *International Text-Book* cases are solicitation cases and firmly establish the doctrine that merely soliciting in the state does not constitute doing business in the state.

The most recent decision, hereinbefore referred to, deals also with solicitation—in that case solicitation for laundries. This was placed by the Supreme Court of the United States beyond state control. The Court stated explicitly that taxing the privilege of *soliciting* interstate commerce is *taxing* interstate commerce.—*Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 393, 96 L. ed. 436, 440:

"If the Mississippi tax is imposed upon the privilege of *soliciting* interstate business, the tax stands on no better footing than a tax upon the privilege of *doing* interstate business. A tax so imposed cannot stand under the Commerce Clause." (Our italics).

The Supreme Court of the United States in the *Memphis* opinion goes back even beyond the *Pigg* case in bringing up to date the "drummer" decisions (342 U. S. 389, 392; 96 L. ed. 436, 439-440):

"In the long line of 'drummer' cases, beginning with Robbins v. Shelby County Taxing Dist. 120 US 489, 30 L ed 694, 7 S Ct 592 (1887), this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term a case involving door-to-door solicitation of interstate business, 'Interstate Commerce itself knocks on the local door.'"

The Circuit Court for Dane County, Branch No. 1, fell into the error of confusing an intrastate transaction with interstate commerce and was reversed by the Supreme Court of Wisconsin not too many years ago in a case involving assignment of a conditional sales contract.—*Minneapolis Securities Corporation v. Silvera*, 254 Wis. 129.

We had put the state of Wisconsin on a "commercial island," in the colorful language of Chief Justice Rosenberry at page 132 of the *Silvera* opinion:

"If the contention of the defendants should be sustained innumerable interstate transactions would

be rendered void and the state of Wisconsin would be on a commercial island."

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 69 L. ed. 982 certainly is on "all fours" with the case at bar. There the city of Portland, Oregon, attempted to exact a license and bond from persons going from place to place to take orders for goods. The hosiery company had 2,000 solicitors in many cities. The Supreme Court of the United States in a most terse opinion emphatically denied the right of local authorities to impinge on interstate commerce by a licensing or bonding requirement. The factual situation and the high court's brief conclusion are thus stated (268 U. S. 325, 334-335; 69 L. ed. 982, 984-985):

> "Appellant is an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Indiana, and selling it throughout the United States to consumers only. It employs duly accredited representatives in many states who go from house to house soliciting and accepting orders. When a willing purchaser is found the solicitor fills out and signs in duplicate a so-called 'order blank.' . . .
>
> "The appellant employs 2,000 representatives, who solicit in most of the important cities and towns throughout the Union, and has built up a very large business—$10,000,000 per annum. Twenty operate in Portland, Oregon.
>
> "May 16, 1923, that city passed an ordinance which requires that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond. . . .

"Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the commerce clause." (Our italics).

Not even cited by Mr. Justice McReynolds in the *Real Silk Hosiery* opinion—the jurist had ample citations without it—is a case seven years before wherein the Court at Washington said—*Chevy Brothers Co. v. Massachusetts*, 246 U. S. 147, 153; 62 L. ed. 632, 636 (again in a remarkably short opinion):

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. . . . We think the tax on this company was essentially a tax on doing an interstate business, and therefore repugnant to the commerce clause."

The Wisconsin legislature has passed a statute—180.97 (2)—directing that foreign corporations do not need a certificate of authority to do business in Wisconsin where all that is engaged in within the state is:

> "(d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts."

The corporation that "chooses to stay at home" and send out "drummers to solicit," is not within the "grip"

of the state government. This again is declared, as recently at 1951, in *Norton Co. v. Department of Revenue*, 340 U. S. 534, 537, 538; 95 L. ed. 517, 520, 521:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. . . .
>
> • • •
>
> "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the Dilworth Case."

From machines to "pieces of paper," the line of Supreme Court of United States decisions is the same. That Court stated in *Freeman v. Hewitt*, 329 U. S. 249, 258-259, 91 L. ed. 265, 275:

> "There remains only the claim that an interstate sale of intangibles differs from an interstate sale of tangibles in respects material to the issue in this case. . . . Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper worth $65,214.20, rather than machines."

International Shoe Company v. State of Washington, 326 U. S. 310, 90 L. ed. 95 is just about the only decision upon which defendant can rely (Commissioner of Banks brief, p. 4). That case allowed the State of Washington

to compute unemployment contributions on wages of solicitors within the state. Congress, however, by express statute had empowered states to so levy these unemployment benefits, which clearly distinguishes the case. The Supreme Court points out (326 U. S. 310, 315; 90 L. ed. 95, 101):

> "Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For (August 10, 1939) 53 Stat 1391, c 666, 26 USCA 1940 ed § 1606 (a) 6A FCA title 26, § 1606 (a) provides that 'No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.' It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it."

That domestic and foreign corporations are treated alike and therefore there is no discrimination against interstate commerce, makes no difference. The burden upon interstate commerce nevertheless is unconstitutional.

Freeman v. Hewitt, 329 U. S. 249, 254; 91 L. ed. 265, 272, 273:

> "It is immaterial that local commerce is subjected to a similar encumbrance.
>
> • • •
>
> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a spe-

cious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade."

Nippert v. Richmond, 327 U. S. 416, 431; 90 L. ed. 760, 769:

"It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done."

We may add, without quotation therefrom, three further Supreme Court of United States decisions which protect interstate commerce against encroachment.

Crutcher v. Kentucky, 141 U. S. 47; 35 L. ed. 649.

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203; 69 L. ed. 982.

Spector Motor Co. v. O'Connor, 340 U. S. 203; 95 L. ed. 573.

We think that the fundamental thing to stress in this connection is not conflict between federal and state *legislation* and pre-empting or not of the field by Congress. The "starting" point is that interstate commerce is set apart, "without implementing legislation by Congress."

Thus the Supreme Court of the United States declared in the *Freeman* case, *supra* (329 U. S. 249, 252; 91 L. ed. 265, 271-272):

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . ."

To cap the climax, the Supreme Court of the United States announced in the *Freeman* case, *(Ibid):*

> *"In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history."* (Our italics).

The course of adjudication is *unbroken through the Nation's history.* We do not feel that Wisconsin successfully can break down that utterance of unbrokenness by the Supreme Court of the United States.

Plaintiff is entitled to a declaratory judgment determining that plaintiff is not required to obtain a license under 218.04, statutes.

Plaintiff in its brief (p. 32) asserts: "This court should declare Sec. 218.04 Stats. unconstitutional." We do not believe that such a determination is necessary. The statute is constitutional, unless it be void as an unlawful delegation of power under the state constitution. The statute, however—we hold— does not apply to plaintiff engaged

in interstate commerce Not applying to it, plaintiff is not permitted to challenge constitutionality.

Plaintiff's counsel may prepare and submit to the Attorney General the declaratory judgment to the effect that plaintiff is not required to obtain a license under 218.04, statutes, and an injunction in accordance with the complaint.

Dated, April 2, 1953.

APPENDIX H
TO JURISDICTIONAL STATEMENT

Opinion of Wisconsin Supreme Court in Metropolitan Finance Corporation v. Matthews, 265 Wis. 275 (formal parts omitted)

APPEAL from a judgment of the circuit court for Dane county: Alvin C. Reis, Circuit Judge. *Modified and, as modified, affirmed.*

The plaintiff is a Missouri corporation with its principal office at Kansas City, Missouri. It is engaged in the business of collecting unpaid accounts and notes throughout several states of the United States, and desires to do business in Wisconsin. The defendant is the duly appointed and acting commissioner of banks of the state of Wisconsin, and is charged by law with the enforcement of sec. 218.04 of the Wisconsin statutes, which refers to collection agencies. This action was brought to obtain a declaratory judgment that plaintiff is not required to comply with the provisions of sec. 218.04 or of regulations made by the defendant pursuant thereto, and to obtain an injunction to

prevent the defendant from enforcing said provisions against the plaintiff.

The complaint alleged that plaintiff conducts its collection business by making use of residents of the state who are independent contractors to solicit various creditors within this state to assign their accounts to the plaintiff for collection. Under its mode of operation such independent contractors are contacted solely through newspaper advertisements and the use of the mails. Under the form of contract with such independent contractors it is asserted that they secure only offers to assign accounts from creditors and that such offers are subject to acceptance or rejection by the plaintiff at its office in Kansas City. Thereafter the only activity of plaintiff is to solicit debtors by mail to pay their accounts and then to remit to the creditors in this state their proportionate share of the sum so collected. The defendant has informed the plaintiff of his belief that the plaintiff is subject to the provisions of such statute which regulates and provides for the licensing of collection agencies, and has further stated that he proposes to enforce the provisions of said statute against the plaintiff if it does business here.

The defendant demurred to the complaint. The plaintiff moved that the demurrer be overruled and that it have judgment in accordance with the demand of the complaint. The demurrer was overruled, and on April 13, 1953, a judgment was entered declaring that plaintiff is engaged in interstate commerce exclusively; that sec. 218.04 of the Wisconsin statutes has no application to the plaintiff and that said plaintiff is not required to obtain a license under said section or to comply with any of the provisions thereof.

The judgment further provided that the defendant be enjoined and restrained from enforcing or attempting to enforce said section against plaintiff or its solicitors. The defendant appealed from the whole of said judgment.

For the appellant there were briefs by the *Attorney General* and *Roy G. Tulane,* assistant attorney general, and oral argument by *Mr. Tulane.*

For the respondent there was a brief by *Stroud, Stebbins, Wingert & Stroud,* of Madison, attorneys, and *Barker, Winger, Bagby, Smith & Loftin* of Kansas City, Missouri, of counsel, and oral argument by *E. L. Wingert* and *Byron H. Stebbins.*

BROADFOOT, J. The trial court held that the proposed activities of the plaintiff would be wholly interstate commerce and that the provisions of sec. 218.04, Stats., would not be applicable to it. In its memorandum decision the trial court relied heavily upon many federal cases cited by the plaintiff, and which are also cited in its brief here. These were the so-called drummer cases. Factually, they are very different from the situation presented to us, and most of the state regulations involved in those cases either placed an undue burden upon interstate commerce or discriminated against nonresidents engaged in interstate commerce, and the regulations were therefore clearly unconstitutional.

The defendant, on the other hand, contends that the constitutional grant to congress of power to regulate interstate commerce does not forbid all regulations by the states of financial transactions in interstate commerce. The defendant cites the so-called insurance and securities, or Blue Sky Law cases in support of its position. These cases, too,

are so different factually from the present case that they do not serve as precedents.

All of the cases do enunciate certain principles of law that may be applied in the determination of this case. So far as it is possible to state an applicable rule in general terms, it is as follows: If plaintiff's business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regulation under the police power, unless congress has, by appropriate legislation, preempted the field with reference thereto.

The defendant has cited the case of *United States v. South-Eastern Underwriters Asso.*, 322 U. S. 533, 547, 64 S. Ct. 1162, 88 L. ed. 1440, in which the rule was stated as follows:

> "Another reason advanced to support the result of the cases which follow *Paul v. Virginia* has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states; and the legislative regulations which this court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with many decisions of this court. It is settled that, for constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, *are so intimately related to local welfare* that, in the absence of congressional action, they may be regulated or taxed by the

states. In marking out these activities the primary test applied by the court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, *in each case*, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting congressional action, the state regulatory and tax laws should be declared valid." (Emphasis supplied).

Thus each case must be considered upon its own facts. So long as the solicitors are independent contractors and not subject to the direction of the plaintiff, its proposed activities within Wisconsin would be so minor that they would not be subject to regulation by the state. That may not be true so far as the solicitors are concerned. Presumably they will be Wisconsin people dealing with Wisconsin people.

The complaint also asked that the defendant be enjoined and restrained from enforcing or attempting to enforce the provisions of sec. 218.04, Stats., against the solicitors, and the judgment so provided. In so far as the judgment refers to solicitors, it must be modified. No solicitor was a party to the action. There are none in existence who could be; none who could authorize plaintiff to represent him or them. The proposed activities of unknown persons cannot be foreseen or described; the complaint does not attempt to do so. Therefore the last three words of the injunction section of the judgment, "or its solicitors," should be stricken therefrom.

The judgment below and this decision are based solely upon the facts as presented by the pleadings and will not be binding upon the defendant in case the plaintiff adopts other methods in its collection business within Wisconsin.

By the Court.—The judgment is modified as herein provided and, as so modified, it is affirmed.